

Supreme Court, U. S.
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**In the
Supreme Court of the United States.**

OCTOBER TERM, 1978.

No. 78-1189.

**THOMAS H. FADDEN, JR.,
PETITIONER,**

v.

**COMMONWEALTH OF MASSACHUSETTS,
RESPONDENT.**

**ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME
JUDICIAL COURT OF THE COMMONWEALTH OF
MASSACHUSETTS.**

Brief of the Respondent in Opposition.

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Brief of the Respondent in Opposition.

Jurisdiction.

Respondent challenges petitioner's claim of jurisdiction. Respondent suggests, and argues, *infra*, that the judgment of the Supreme Judicial Court is not a final decision within the terms of 28 U.S.C. § 1257(3).

Statement of the Case.

On October 23, 1976, four criminal complaints issued from the Third District Court of Eastern Middlesex County charging homicide by motor vehicle by negligently operating to endanger, speeding, driving to endanger and operating a motor vehicle while under the influence of alcohol. Later, a fifth complaint issued charging homicide by motor vehicle by operating under the influence of intoxicating liquor. All complaints arose out of the same incident.

The petitioner moved to dismiss the fifth complaint as duplicitous and as violative of the constitutional prohibition against double jeopardy. After trial on all complaints, the court ordered the fifth complaint dismissed and found the petitioner guilty on the other four complaints.

The petitioner appealed to the Superior Court for a trial de novo and moved to dismiss the complaint charging motor vehicle homicide on the ground that he had been previously placed in jeopardy. The motion was denied and the petitioner sought injunctive and declaratory relief. The Supreme Judicial Court held that the proceedings in the District Court did not bar further proceedings in the Superior Court. *Fadden v. Commonwealth*, Mass. Adv. Sh. (1978) 2830, 382 N.E. 2d 1054.

Reasons For Not Granting Certiorari.

I. THE DECISION OF THE COURT BELOW IS NOT A FINAL JUDGMENT UNDER 28 U.S.C. § 1257(3).

Following the finding of guilt on the complaint charging negligent homicide by motor vehicle and dismissal (not acquittal) of the complaint charging driving under the influence re-

sulting in the death of a person, the petitioner appealed and claimed a trial de novo.¹ In the Superior Court he advanced a plea in bar by way of a motion to dismiss alleging a violation of the Fifth Amendment prohibition against double jeopardy. The motion was denied. The petitioner then sought injunctive and declaratory relief in the appellate courts of Massachusetts pursuant to Mass. Gen. Laws, c. 211, § 3, and c. 231A. The Supreme Judicial Court found nothing improper in the District Court proceedings and entered an order declaring that the proceedings in the District Court did not bar further prosecution in the Superior Court on the complaint for motor vehicle homicide by negligently operating to endanger. Such interlocutory rulings in criminal cases have traditionally been viewed as lacking the finality necessary to support review by this Court. *Chapman v. California*, 405 U.S. 1020 (1972); *Eastman v. Ohio*, 299 U.S. 505 (1936). Such has been the case even where no significant question of fact or law remains for trial. E.g., *Chapman v. California*, *supra* at 1025 (Douglas, J., dissenting). But see *Harris v. Washington*, 404 U.S. 55 (1971).²

Abney v. United States, 431 U.S. 651 (1977), does not compel a contrary result. *Abney* merely held that a federal court's

¹ Certiorari does not lie from a judgment of the district or first tier court. *Costarelli v. Massachusetts*, 421 U.S. 193 (1975); *Whitmarsh v. Massachusetts*, 421 U.S. 957 (1975).

² *Harris* is distinguishable on the merits. *Harris* had been acquitted. The State then attempted a second prosecution which would have required relitigation of the same ultimate fact determined adversely to the State in the first trial. In the instant case the petitioner was not acquitted; the complaint was dismissed. It is the petitioner, not the State, who claimed a second trial; and the ultimate fact to be litigated is whether the petitioner recklessly or negligently operated a motor vehicle and by such operation caused the death of another person. The ultimate fact to be proven on the complaint which was dismissed was whether the petitioner operated a motor vehicle while under the influence of intoxicating liquor resulting in the death of a person.

pretrial denial of a motion to dismiss on double jeopardy grounds was a final appealable decision within the meaning of 28 U.S.C. § 1291. To have held otherwise would preclude a defendant from any appellate review of his claim prior to trial. However, Massachusetts has provided review of that claim and it is petitioner, not the Commonwealth, who has sought a trial de novo, thus utilizing a procedural two-tier system which has been held not to violate the prohibition against double jeopardy. *Ludwig v. Massachusetts*, 427 U.S. 618, 630-632 (1976).

Moreover, in *Abney* the Court was not called upon to consider the application of the principles of comity and federalism enunciated in *Younger v. Harris*, 401 U.S. 37 (1971), which preclude interference with ongoing good faith state criminal proceedings absent exceptional circumstances.

II. THERE IS NO CONFLICT BETWEEN THE DECISION OF THE COURT BELOW AND THE DECISIONS OF THIS COURT.

Respondent suggests that several factual distinctions are present in the instant case which render distinguishable and inapplicable the decisions of this Court relied upon by the petitioner. In summary, the petitioner was brought to trial on all the complaints in a single District Court proceeding; one complaint was dismissed; the petitioner was found guilty on the remainder. Petitioner was not acquitted on any complaint; the petitioner was not given either concurrent or consecutive sentences on the allegedly duplicitous complaint; it is the petitioner, not the Commonwealth, who has appealed and claimed a trial de novo on those complaints of which he was found guilty.

As argued in the Commonwealth's *Opposition to Petitioner's Motion to Stay*, *Sanabria v. United States*, 437 U.S. 54 (1978),

is inapposite. Sanabria was charged in a single count indictment with violation of § 1955 in that he conducted an illegal gambling business, in violation of Mass. Gen. Laws, c. 271, § 17. The trial court concluded that evidence of numbers betting constituted only proof of a crime under Mass. Gen. Laws, c. 271, § 7, and not § 17, ordered the evidence of numbers betting excluded, and granted a judgment of acquittal. The government appealed, seeking a new trial on the portions of the indictment relating to the numbers betting. The Court of Appeals, viewing the horse betting and numbers allegations as "discrete bas[e]s of criminal liability," treated the District Court's action as a dismissal of the numbers activity and remanded for trial on that portion of the indictment charging a violation of § 1955 based on numbers activity. *United States v. Sanabria*, 548 F. 2d 1, 5, 8 (1st Cir. 1976). This Court reversed, holding that the single allowable unit of prosecution under § 1955 is participation in a single "illegal gambling business" (437 U.S. at 70). Therefore, a judgment of acquittal on the only count alleged is an absolute bar to any further prosecution. However, in the instant case, the complaint charging violation of Mass. Gen. Laws, c. 90, § 24G, by reason of driving under the influence was dismissed. Such a procedure is not an improper means for curing duplicitous complaints and cures any prejudice to a defendant by precluding the imposition of consecutive sentences. Double jeopardy principles are not involved. In *Simpson v. United States*, 435 U.S. 6 (1978), this Court held merely, as a matter of statutory construction, that "in a prosecution growing out of a single transaction of bank robbery with firearms, a defendant may not be sentenced under both § 2113(d) and § 924(c)." *Simpson* at 16. The procedure followed in the instant case is entirely consistent with *Simpson*. See also, *Lee v. United States*, 432 U.S. 23 (1977).

Therefore, respondent submits that not only was the procedure followed in the instant case consistent with the dictates of this Court, but, the constitutionality of the trial de novo system having been upheld (*Ludwig v. Commonwealth, supra*), petitioner has not presented a constitutional claim.

Conclusion.

The petition for writ of certiorari should be denied.

Respectfully submitted,

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